Republic of the Philippines
SECURITIES AND EXCHANGE COMMISSION
SEC Bldg. EDSA, Greenhills, Mandaluyong City

OFFICE OF THE GENERAL COUNSEL

27 August 2010

SEC-OGC Opinion No. 10-27
Notice of Meetings,
Delinquent Stockholders

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Sir:

This refers to the queries of your client, Medicus Philippine Paramedical & Technical School (Iloilo), Inc. ("Medicus") in connection with SEC-OGC Opinion No. 10-15 dated 23 April 2010 on Delinquent Stocks, Delinquency Sale, Effect of Delinquency.

You have narrated the facts and stated your queries as follows:

"A stockholder in a corporation subscribed to 59.99% of the total stocks of a corporation, of which 46.12% thereof remained unpaid. A call for payment was made by the corporation wherein the said stockholder failed to pay for his subscription and said subscription was subsequently declared delinquent. Later on, the same was made the subject of an auction sale, however, the same ended in failure for lack of a bidder.

Queries:

1. Is a delinquent stockholder entitled to notices for the stockholders' meeting?

2. What is the effect if the delinquent stockholder continuously ignores the notices for the stockholders' meeting? What is the remedy of the corporation?

3. If the subscription of a stockholder amounting to 59.99% of the stocks of the corporation has been previously declared delinquent and the stockholder thereof is inactive and continues to be so, will previously decided matters and/or matters resolved upon by the remaining stockholders in a stockholders' meeting be valid?

4. In the event that a delinquent subscription, which was previously a subject of an auction sale with no bidder, was again put up for sale in another auction sale, can the corporation enter into an agreement with the bidder to subject the payment for the said sale to terms of payment, i.e. to be paid in installment basis?

5. Can the corporation be dissolved by the remaining stockholders, considering that the subscription for the majority of the shares has been declared delinquent?"

Query No. 1

Notice need be given only to each stockholder of record entitled to vote at the meeting,[1] or to those entitled to be present.[2] Section 71[3] of the Corporation Code ("Code") is explicit that the moment a stock becomes delinquent, the holder thereof loses his right to vote, and thus his right to be represented at any stockholders' meeting.[4]

Query No. 2

If a delinquent stockholder continuously ignores the notices for the stockholders' meeting, such may be deemed as an implied waiver of his right to be present at the stockholders' meeting. The Code is silent on the remedy for a situation where a delinquent stockholder continuously ignores the notices for the stockholders' meeting.

Query No. 3

Delinquent subscription is treated in Section 67 of the Code which provides:

"xxx Payment of any unpaid subscription or any percentage thereof, together with the interest accrued, if any, shall be made *on the date specified in the contract of subscription or on the date stated in the call made by the board.*

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[1] 5 Am Fletcher Cyc Corp 2d Wills § 59 (1987)
[2] *Id.*
[3] SECTION 71. Effect of delinquency. — No delinquent stock shall be voted for or be entitled to vote or to representation at any stockholder's meeting, nor shall the holder thereof be entitled to any of the rights of a stockholder except the right to dividends in accordance with the provisions of this Code, until and unless he pays the amount due on his subscription with accrued interest, and the costs and expenses of advertisement, if any.
[4] SEC Opinion dated June 16, 1998 addressed to Carlos L. Agustin; SEC Opinion dated March 13, 1998 addressed to Jose A. Feria; SEC Opinion dated November 16, 1982 addressed to Philippine Overseas Drilling and Oil development Corporation in L. M. Decasa, Handbook on Private Corporations 484-485 (2009).

> Failure to pay on such date shall render the entire balance due and payable and shall make the stockholder liable for interest at the legal rate on such balance, unless a different rate of interest is provided in the by-laws, computed from such date until full payment. *If within thirty (30) days from the said date no payment is made, all stocks covered by said subscription shall thereupon become delinquent* and shall be subject to sale as hereinafter provided, unless the board of directors orders otherwise." (Italics supplied)

Based on your letter dated 24 February 2010, where you wrote, "We made a Call For Payment for unpaid subscriptions and have declared a major subscription as delinquent xxx," *it is clear that the delinquency occurred due to the call made by the board* and not due to the contract of subscription. This appears to be an uncommon situation wherein the majority shareholder, with a subscription amounting to 59.99% of the stocks of the corporation, failed to control the board, and allowed himself to be declared delinquent.

Noteworthy is the fact that out of the total amount of shares he subscribed to, in the amount of Php 5,999,000.00, Arturo Lacuesta has paid the amount of Php 2,399, 000.00 as of March 2008,[5] which was increased to Php 3,232,000.00 as of General Information Sheet ("GIS") filed on 14 April 2009. Moreover, the GIS received by the Commission's Iloilo Extension Office on March 28, 2008 shows that Arturo Lacuesta, the majority stockholder whose stocks have been declared delinquent, was the Chair of the Board, but as of GIS filed on 14 April 2009, he was replaced by Manuel J. Posecion who has paid the amount of Php 100,000.00 for his total subscription.

Worthy of note too are the changes in the composition of the directors of Medicus as shown by its 2008 and 2009 GIS. In addition to the replacement of the Chair by a minority shareholder, Oscar Lacuesta was also replaced by Vincent Joseph C. Villareal. As a result, two Lacuestas were replaced, leaving directors representing shares in the amount of a mere Php 435,000.00.[6]

Thus, the members of the board representing the minority shareholders declared the majority shareholder delinquent. This is a peculiar situation, but we cannot opine on the validity of the declaration of delinquency.

Since the situation is out of the ordinary, (that is, when the board declares the shares of stock of a minority shareholder delinquent), the general rule[7] cannot apply to Medicus.

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[5] Amended Articles of Incorporation dated 23 April 2008
[6] GIS filed 14 April 2009.
[7] The general rule is that, based on Section 71 of the Code, delinquent shares are not included in the determination of a quorum for shareholders' meeting. SEC Opinion dated March 13, 1998 addressed to Jose A. Feria, Jr.

Thus, matters decided or resolved upon by the remaining stockholders of Medicus representing 40.01% of its stocks, after the declaration of delinquency of the subscription of a stockholder amounting to 59.99% of the stocks of the corporation are *not valid*, because of the absence of quorum.[8] This is consistent with the opinion of this Commission addressed to Medicus dated 23 April 2010, where we stated: "Therefore, it appears that even if 40.01 of the total stocks , fully paid and not delinquent are entitled to vote, Medicus cannot muster a quorum unless the 59.99% of the total stocks are sold."

This now leads to the absurd situation where Medicus is unable to muster enough number of stockholders to constitute a quorum for purposes of holding a stockholders' meeting.

Query No. 4

The payment must be made in full at the time of the sale, and not subject to terms, or in installment basis. In the sale of delinquent stocks, the highest bidder is the person who offers to pay or is willing to pay *the full amount of the balance on the subscription* together with accrued interest, costs of advertisement and expenses of sale, for the smallest number of shares or fraction of a share.[9] The stock so purchased shall be transferred to such purchaser in the books of the corporation and *a certificate for such stock shall be issued in his favor.*[10] Because a certificate of stock shall be issued in favor of the successful bidder, with more reason should the payment be made in full, otherwise, the certificate of stock cannot be issued, as prescribed by Section 64[11] of the Code.

Query No. 5

In view of the requirements[12] for dissolution of a corporation by shortening the corporate term, we reply in the negative.

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[8] A *quorum*, as provided for in the By-Laws of Medicus, just like Section 52 of the Code, consists of *a majority of the outstanding capital stock.*

[9] SEC Opinion dated November 21, 1991 addressed to Carlos A. Rosales.

[10] Section 68, Corporation Code.

[11] SECTION 64. Issuance of stock certificates. — No certificate of stock shall be issued to a subscriber until the full amount of his subscription together with interest and expenses (in case of delinquent shares), if any is due, has been paid.

[12] viii. Dissolution (By Shortening Corporate Term)

1. Directors' Certificate – a notarized document signed by a majority of the directors/trustees and the corporate secretary, certifying the amendment of the Articles of Incorporation shortening the corporate term, the votes of the directors/trustees and stockholders/members, and the date and place of the stockholders'/members' meeting
2. Amended Articles of Incorporation

In amending the Articles of Incorporation, the same cannot be accomplished except by "a majority vote of the board of directors or trustees *and* the vote or written assent of the *stockholders representing at least two-thirds (2/3) of the outstanding capital stock.*" As noted earlier, because of the act of the Board of Directors declaring 59.99% of the total stocks delinquent, Medicus is now in a situation wherein it cannot validly act on matters requiring the decision of the majority of the stockholders.

The remedy is found in Section 67 of the Code: "Payment of balances of subscription. — xxx If within thirty (30) days from the said date no payment is made, all stocks covered by said subscription shall thereupon become delinquent and shall be subject to sale as hereinafter provided, *unless the board of directors orders otherwise.*" (Italics supplied) Under the above provision, the board of directors may order the removal of the delinquent status of unpaid subscription. Unless there is such an order from the board, its delinquent status remains.[13]

It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases whether of similar or dissimilar circumstances. If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel

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3. Audited financial statements as of date of the stockholders' meeting approving the dissolution or any date thereafter but not earlier than 60 days prior to the date of filing of the application
4. List of creditors, if any, and the consent of the creditors, or certification as to non- existence of creditors
5. BIR tax clearance
6. Publisher's affidavit of the publication of the notice of dissolution of the corporation (once a week for three [3] consecutive weeks)
7. Endorsement/clearance from other government agencies, if applicable

Note: In cases where there are creditors and the consent of the creditors was not secured, the application should be in the form of a petition to be filed with Office of General Counsel of the SEC source: http://www.sec.gov.ph/ accessed August 4, 2010.

[13] SEC Opinion dated March 6, 1984 addressed to Emmanuel de Castro.